U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0334

RANDY COTHRON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KINDER MORGAN BULK TERMINALS	)	DATE ISSUED: Jan. 10, 2017
	)	
and	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

John J. Sharpless (Law Office of Michael J. Winer, P.A.), Tampa, Florida, for claimant.

Phillip S. Howell and David T. Burr (Galloway, Johnson, Tompkins, Burr & Smith, PLC), Tampa, Florida, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (2014-LHC-01095) of Administrative Law Judge Pamela J. Lakes rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant commenced working for employer on January 3, 2008, first as a longshoreman and later as an equipment operator, at employer's Tampaplex facility. Claimant alleged he was exposed to dust, ash, and various pulmonary irritants during his employment. Additionally, during the morning hours of December 8, 2012, a silo located on employer's facility ruptured, exposing claimant to bed and fly ash. Claimant testified that, as a result of this specific exposure event, he became nauseated and experienced shortness of breath and a burning sensation on his skin. Claimant last worked for employer on December 17, 2012; he sought medical care that day and subsequently has received treatment for a number of acute and chronic medical conditions, including bronchitis and sinusitis, as well as watery eyes and skin irritation. He filed a claim for disability and medical benefits under the Act.

In her Decision and Order, the administrative law judge applied Section 20(a), 33 U.S.C. §920(a), to presume that claimant's respiratory, eye, and skin conditions are related to his employment exposures with employer. She next found that while employer rebutted the existence of Reactive Airways Dysfunction Syndrome, it did not rebut the Section 20(a) presumption with respect to claimant's remaining conditions and symptoms. Assuming, arguendo, that employer had established rebuttal of the Section 20(a) presumption, the administrative law judge further found, based upon the record as a whole, that claimant's respiratory conditions, including acute and chronic bronchitis and sinusitis, acute eye and skin conditions, and ongoing chemical sensitivity were caused at least in part by his employment exposures with employer. After addressing the remaining issues disputed by the parties, the administrative law judge held employer liable for medical benefits related to claimant's conditions, as well as for temporary total disability compensation from December 17, 2012 to January 1, 2014, temporary partial disability compensation January 1, 2014 to October 24, 2014, and continuing permanent partial disability compensation from October 24, 2014. 33 U.S.C. §§907, 908(b), (c)(21), (e).

On appeal, employer challenges the administrative law judge's finding that claimant is entitled to the benefit of the Section 20(a) presumption. Alternatively, employer asserts the administrative law judge erred in determining that it failed to present evidence sufficient to rebut the Section 20(a) presumption and that the administrative law judge erred in finding a causal relationship between claimant's conditions and his work exposures based on the record as a whole. Claimant responds, urging affirmance of the administrative law judge's decision in its entirety.

Employer initially contends the administrative law judge erred in invoking the Section 20(a), 33 U.S.C. §920(a), presumption. In order to be entitled to the Section 20(a) presumption, claimant must establish the two elements of his prima facie case: an injury or harm and a work-related accident or working conditions that could have caused or aggravated the harm. *See Ramsey Scarlett & Co. v. Director, OWCP* [*Fabre*], 806

F.3d 327, 49 BRBS 87(CRT) (5th Cir. 2015); *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Claimant is not required to introduce affirmative medical evidence that the working conditions in fact caused his harm in order to establish his prima facie case. *See generally Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989). Once claimant establishes his prima facie case, Section 20(a) links his harm to the employment accident or working conditions. *See Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000).

In this case, employer does not specifically dispute the existence of the symptoms allegedly sustained by claimant, *see* Emp. Br. at 11, or that claimant presented evidence of his exposure to ash during his employment with employer, *id.* at 4, 12. Employer, however, challenges the administrative law judge's invocation of the Section 20(a) presumption on the ground that no credible evidence exists that claimant's exposure to ash could have caused his chronic medical conditions. *Id.* at 11-12. In invoking the presumption, the administrative law judge discussed claimant's testimony regarding his exposures to ash and other irritants while working for employer, two OSHA Material Data Safety Sheets,[1] and the opinions of Drs. DeMott, Dydek, Kreitzer, Bohnkner, and Axel, each of whom opined that claimant's respiratory symptoms are related to his work-related exposure to ash.[2] *See* Decision and Order at 33-39; *see also* Tr. at 362-363; CXs

[1] The two OSHA documents describe the possible health effects resulting from exposure to bed and fly ash. These include eye and skin irritation, fibrosis, chronic bronchitis, silicosis, and aggravation of pre-existing diseases of the lungs. CXs 17, 18.

[2] We reject employer's argument that, in light of the decision of the United States Court of Appeals for the Eleventh Circuit in *McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233 (11th Cir. 2005), the testimony of these physicians is not "sufficiently reliable." In *McClain*, the court addressed at length the effort to exclude from admission into evidence experts' testimony under the standards set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Section 23(a) of the Act provides:

> In making an investigation or inquiry or conducting a hearing the deputy commissioner or Board shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties.…

33 U.S.C. §923(a); *see also* 20 C.F.R. §702.339. Moreover, Section 702.338 of the Act's implementing regulations states, in relevant part, that:

1, 2, 4, and 5. Thus, we reject employer's argument that claimant did not establish his prima facie case, and, as it is supported by substantial evidence, we affirm the administrative law judge's invocation of the Section 20(a) presumption. The credited evidence establishes claimant sustained several physical injuries and the existence of exposures at work which could have caused or aggravated those conditions. *See Hunter*, 227 F.3d 285, 34 BRBS 96(CRT); *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39 (2000); *Sinclair*, 23 BRBS 148.

Upon invocation of the Section 20(a) presumption, the burden shifts to employer to rebut the presumed causal connection with substantial evidence that claimant's injury was not caused or aggravated by the exposures at work. *See Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990); *see also Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). If the administrative law judge finds that the Section 20(a) presumption is rebutted, it no longer controls, and the issue of causation must be resolved on the evidence of record as a whole, with claimant bearing the burden of persuasion. *See*

> The administrative law judge shall inquire fully into the matters at issue and shall receive in evidence the testimony of witnesses and any documents that are relevant and material to such matters….

20 C.F.R. §702.338. Additionally, under the Rules of Practice and Procedure Before the Office of Administrative Law Judges,

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, pursuant to executive order, by these rules, or by other rules or regulations prescribed by the administrative agency pursuant to statutory authority.

29 C.F.R. §18.402; *see also* 29 C.F.R. §18.401 (defining "relevant" evidence). Thus, the Act and regulations afford the administrative law judge wide discretion to admit evidence relevant to the issues before him. *Tampa Ship Repair & Dry Dock Co. v. Director, OWCP*, 535 F.2d 936, 4 BRBS 243 (5th Cir. 1976); *Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, Nos. 91-70642, 92-70444 (9th Cir. 1993); *McCurley v. Kiewest Co.*, 22 BRBS 115 (1989). In this case, the admissibility of the medical opinions was not at issue, *Casey v. Georgetown Univ. Medical Center*, 31 BRBS 147 (1997), and the administrative law judge is afforded wide discretion to determine the weight to be accorded to the medical opinions of record. *See, e.g., Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995).

O'Kelley, 34 BRBS 39; *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

The administrative law judge found that employer failed to produce evidence sufficient to rebut the Section 20(a) presumption. Specifically, the administrative law judge determined that Dr. McCluskey acknowledged that claimant's exposure to ash could have aggravated his respiratory symptoms, that Dr. DeMott acknowledged that claimant's exposure to ash could have irritated claimant's eyes and respiratory passages, and that Dr. Poole's testimony did not account for the actual amount of ash that claimant was exposed to during the silo rupture. *See* Decision and Order at 39-41. Employer contends that the opinions of Drs. McCluskey, Poole and DeMott constitute substantial evidence sufficient to rebut the Section 20(a) presumption. We need not address employer's challenge to the administrative law judge's finding that employer did not rebut the Section 20(a) presumption because, assuming, arguendo, that the presumption is rebutted, the administrative law judge's conclusion that claimant's conditions are related to his employment exposures to ash is supported by substantial evidence on the record as a whole. *See generally Peterson v. Columbia Marine Lines*, 21 BRBS 299 (1988).

The administrative law judge found that the medical evidence as a whole establishes that claimant's acute and chronic conditions, including his bronchitis, sinusitis, eye and skin conditions, and chemical sensitivity, result at least in part from his work exposures to ash. *See, e.g., Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Conoco, Inc. v. Director, OWCP* [*Prewitt*], 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). The administrative law judge noted that, while the exact amount of claimant's exposure is in dispute, it is undisputed that claimant was in fact exposed to ash when a silo ruptured on December 8, 2012, and that claimant suffered acute and ongoing chronic symptoms following that incident. The administrative law judge relied on the opinions of Drs. Kreitzer,[3] Bohnker,[4] and Axel,[5]

[3] Dr. Kreitzer, a Board-certified pulmonologist, examined claimant on one occasion and, after reviewing claimant's medical records, opined that claimant's bronchitis and sinusitis are related to his ash exposure with employer. He stated claimant should work in a "clean" environment. CX 1 at 121-124.

[4] Dr. Bohnker, who is Board-certified in the areas of occupational, aerospace, and general preventative medicine, examined claimant on December 18 and 26, 2012, and January 9, 2013, and opined that claimant's work-related exposure was a significant factor in his need for medical care. CX 4 at 24.

[5] Dr. Axel, who is Board-certified in pulmonary and internal medicine, examined claimant on January 28, 2013, and opined that claimant's symptoms are consistent with a reaction to ash exposure. CX 5 at 12, 23, 74.

who related claimant's conditions to his work exposures. The administrative law judge rejected the contrary opinion of Dr. McCluskey,[6] which she found to be equivocal and not based upon reasonable medical certainty. *See* Decision and Order at 41-42.

We reject employer's contention that the opinions of Drs. Kreitzer, Bohnker and Axel do not constitute evidence which is sufficiently reliable to establish a causal relationship between claimant's medical conditions and his work exposures on the record as a whole. *See Ramsey Scarlett & Co.*, 806 F.3d 327, 49 BRBS 87(CRT). It is well-established that an administrative law judge has considerable discretion in evaluating and weighing the evidence of record and is not bound to accept the opinion or theory of any particular medical examiner. *See John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *see also Newport News Shipbuilding & Dry Dock Co. v. Cherry*, 326 F.3d 449, 37 BRBS 7(CRT) (4th Cir. 2003); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). In this case, the administrative law judge discussed at length the medical opinions, *see* Decision and Order at 14-31. She rationally credited the opinions of Drs. Kreitzer, Bohnker and Axel, as supported by the OSHA Material Safety Data Sheets, *see* n.1 *supra*, that claimant's respiratory conditions, including bronchitis and sinusitis, eye and skin conditions, and chemical sensitivity are due at least in part to the ash exposure at employer's facility. Decision and Order at 41-42. Thus, we affirm the administrative law judge's conclusion that claimant's respiratory conditions, including bronchitis and sinusitis, eye and skin conditions, and chemical sensitivity are related to his employment, as it is supported by substantial evidence of record. *See Tampa Ship Repair & Dry Dock Co. v. Director, OWCP*, 535 F.2d 936, 4 BRBS 243 (5th Cir. 1976); *Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP* [*Hess*], 681 F.2d 938, 14 BRBS 1004 (4th Cir. 1982). As employer does not challenge the remaining findings of fact and conclusion of law of the administrative law judge, the award of disability and medical benefits to claimant is affirmed.

[6] Dr. McCluskey, who is Board-certified in occupational medicine, examined claimant on September 12, 2014. While opining that claimant's December 8, 2012, work-related exposure did not result in any permanent disease process, *see* EX 37 at 13, Dr. McCluskey conceded that it would not be unreasonable for claimant to have experienced irritation from that work incident. *See* EX 26 at 93.

Accordingly, the administrative law judge Decision and Order Granting Benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge